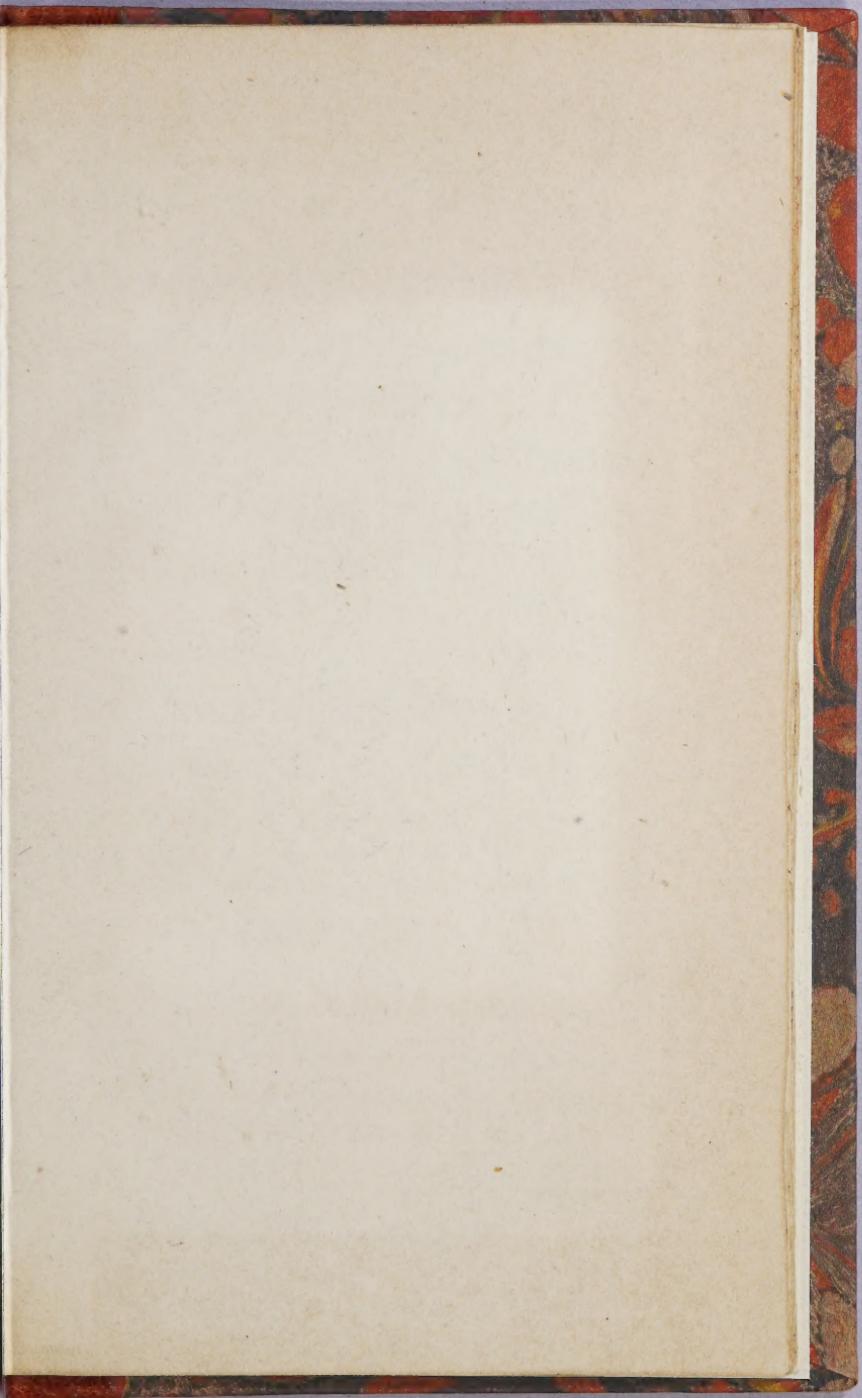




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SCOTLAND'S RIGHT to CALEDONIA (Formerly called DARIEN)

And the Legality of its Settlement, asserted in Three several Memorials presented to His Majesty in May 1699.

B Y

The Lord President of the Session and Lord Advocate, on behalf of the Company of Scotland, Trading to Africa and the Indies.

Quod enim est nullius, per occupationem acquiritur ejus Dominium. Puffend. de Jur. Nat. & Gent.

Printed in the Year, 1700.

SCOTTISH
RIGHTE OF CIVIL SOVEREIGNTY
MURKIN
John
Sovereign of Scotland
and
the
Commonwealth
of
Scotland
in
vilest Manner
1651

.22d.

The Right of the
King and Parliament to the
Commonwealth
and Commonwealth
of Scotland
Treated
of by
Sir Robert
Smythson
of Scone
1651

RP108

1651
The Right of the King and Parliament to the Commonwealth
and Commonwealth
of Scotland
Treated
of by
Sir Robert
Smythson
of Scone

Printed at York 1651

The Three following Memorials were presented to His Majesty in May 1699.
by the Lord President of the Session, and
Lord Advocate, on behalf of the Company
of Scotland, Trading to Africa and the
Indies, asserting the Legality of their
Settlement in Darien.

1st. MEMORIAL.

The Establishment of the Company of Scotland, Trading to Africa and the Indies, was first prepared by an Act of Parliament 1693. Inviting and Encouraging Persons in General, to enter into Societies, and Companies, for carrying on a Trade to whatsoever Kingdoms, Countries, or parts of the World, not being in War with His Majesty, and thereafter perfected by the Act of Parliament 1695, and a Charter thereon under the Great Seal, whereby the said Company was fully Settled with all the Powers, Privileges, and Immunities in use to be granted in such cases, and particularly with Power to plant Colonies, and build Cities, Towns, and Forts in Asia, Africa, or America, upon Places not Inhabited, or upon any other Place, by Consent of the Natives, and Inhabitants thereof, and not possess'd by any European Prince or State.

The Settling of this Company was so acceptable to the whole Kingdom, abounding always with Men, and of late Years, very desirous to enlarge Trade and Commerce, That the Companys

pany's Books being once opened, Subscriptions for a vast Sum were compleated long before the Day prefix'd by the Act of Parliament, and there were few Persons or Families of any Account within the Kingdom, who were not therein particularly concerned.

But tho' the Subscriptions were soon compleat-ed, and the Advances made, as readily as propos'd ; yet the Directors and Managers, did proceed with great Deliberation, not being more Cautious to Conceal the Place where they were design'd for, than Careful to make such a Choice, as might be exactly in the Terms of their Act and Patent, To wit, Either not Inhabited, or freely Consented to, by the Natives, and not possess'd by any European Prince or State, and so lyable to no Exception.

In pursuance of these Resolutions, The Company prepared Men, and Provisions, and set out their Ships, and in the Month of November 1698, arrived on the Noth-side of the Isthmus of Darien in America, they pitched upon a Place never before possess'd by the Spaniards ; and after formal and distinct Treaties, obtained the Consent and Good-will of all the Neighbouring Natives and People.

The Spaniards and French raise a Clamour against the Settlement, as an Invasion of the Spanish Possessions and Dominions, in as much as the Place where the Company hath fixed, lyes as it were in the Middle and Bosom of the Spanish Countries, having Cartagena on the East, and Porto-Bello on the West, and Panama on the South, which is also alledged to be contrary to the Treaties

Treaties betwixt the King of Great Britain and the King of Spain, whereby all these Countries are yeilded and conformed to the Spaniards.

If these parts of America had been wholly Void and Uninhabited, when the Spaniards made their first Discoveries, and Plantations there, the Question had certainly proceeded upon the head of Occupation, the only Ground acknowledg'd by all Lawyers to determine the Property of all Waste and Uninhabited Countries, where a formal Division hath not Interveneed, as Grotius in particular, in his Second Book *de jure Belli* doth abundantly clear, and then the Spaniards must have further Subsumed, That as they found these Countries Waste, so they were the Occupiers and Possessors thereof; and in Special, that they were the first Occupiers and Possessors of the *Isthmus of Darien*, and the Place where the Company hath Settled, it being most certain, that Occupation gives no Right, save in so far as the Real and Actual Possession extends.

But seing on the other hand, it is Nottour, and by all Acknowledg'd, That the Spaniards did not find these Parts Waste, and Uninhabited, this Argument must necessarily fall; and all that the Spaniards can now Plead, is either present Possession, which the Company's Patent owns to be a sufficient Right to any European Prince or State, or the above-mention'd Treaties, as exclusive of the King of Great Britain's Subjects.

For clearing then the Claim and Point of Possession, The Company denies that ever the Spaniard had any Possession of the Place where they have Planted; and its obviously Incumbent

to the Spaniard, if they alledge Possession, to prove and instruct their Allegiance for the Company's Argument being Negative, *viz.* That the Spaniards did never Possess the Country where the Company hath Settled, it Undeniably proves it self, as all Lawiers affirm, unles the contrary, to wit, The Spaniards Possession, be evidently made out and proved, which is impossible; Nor do the Spaniards pretend to prove the same; But their Allegiance is, That in these large Countries of *America*, it were plainly Capricious to require the Actual Possession of every particular Place; But since they have the Uncontraverted Right and Possession of *Carthagena*, *Porto-Bello*, and *Panama*, which are the Extremities that in a manner environ the *Isthmus of Darien*, their Possession of these Places, must infer a Possession of the Interjacent Country in which the Company hath Settled, and consequently, that the Company hath Encroached upon, and Invaded their Right: And further, its said, That the Spaniards have actually posses'd Gold and Silver Mines in *Darien*, much nearer to the Company's Settlement than *Cartagena*, or these other Places, and have constantly been in use to Seize and make Prize of all Ships coming upon the Coast, betwixt *Porto-Bello* and *Carthagena*, as Invaders of their Possessions, tho' these Ships did really pertain to Friends and Allies.

To all which, It is answered, *imo.* That the above-mentioned Places belonging to the Spaniard, are very far distant from the Settlement of the Company, *Carthagena* above Fifty, and *Porto-bello*, and *Panama* above Thirty Leagues, which Distances are more then sufficient to render Countries

tries distinct; both as to Right and Possession.
 2d. It's certain, that *Carthagena*, *Porto-bello* or *Panama*, cannot be understood to have unlimited Territories; if then their Territories be limited, it belongs to the makers of the Objection to show, that the Limits of these places do reach to, and comprehend the Place possess'd by the Company, which neither the *Spaniards*, nor any for them, will ever be able to prove, by the Law of Nations, or any known Rule, or Custom in such Cases.

It hath already been Notic'd, That tho' these Countries had been wholly Void, when the *Spaniards* begun to Plant there, they could only by their Possession have appropriat as far as they did possess, and that what was not possess'd, would have remain'd free, to be appropriated by the Occupation, and possession of any other People, a Rule Uncontraverted amongst all Nations on the Face of the Earth.

But the Case of *America* being, That before any Plantations were Settled there, by the *Spaniards*, the Natives were undoubtedly the Possessors and Proprietors. It follows necessarily, That Colonies coming to Settle among them, must derive Right from them, and that either by Consent, Surrender, or Conquest, it being impossible in the case of Countries inhabited, there can be any other Manner or Mean of Acquisition; But so it is, That the *Spaniards* acquiring after this manner, neither could, nor can pretend to have Right to more than did pertain to the People where they Settled, whether by Consent, Surrender or Conquest.

Whence it necessarily follows, That since *Darien* was a distinct Country, and the Inhabitants there-

thereof a distinct People, from those Countries and Nations, where the Spaniards have hitherto Settled whether by Consent, Surrender, or Conquest; The Spaniards cannot pretend to extend their Right beyond that of their Predecessors, and the People & Country of Darien must still be as free from the Spaniards, as they were from their Predecessors; and consequently, that the Company coming to possess with the *Dariens* Consent, and by their Right, must be in the like Condition, and noways lyable to either the Claim, or Complaint of the Spaniards, That the Country and Natives of Darien did never submit to, or were conquered by the Spaniards, must stand as a sure Position, unless the contrary be proven: But further, it is also certain, That the *Dariens* were never Reputed to have any Dependency even on the great Empires of Mexico and Peru, much less upon the little places of Carthagena, Porto-bello, or Panama: Besides, The *Dariens* have been in frequent War with the Spaniards, since their first arrival into these Parts, and were never to this day Conquered: All which being attested by the English, and other Travellers, who have Written on this Subject; It appears to be beyond Controversy, That the Company having Settled with the Consent of these *Dariens*, must have the same Right, with the same Priviledges and Freedom of Trade which the *Dariens* had, and that both are equally free from all the Spanish Pretensions.

It is a known Case that an English Man one Sharp, having joyn'd with the *Dariens* against the Spaniards, invaded their Territories; he was accused by the Spaniards in England, as guilty of

Rob-

Robbery and Piracy, but was acquitted, because he acted by Commission from one of the *Darien* Princes, which is an undeniable Evidence, that this Prince and his Countrey were judged to be independent on the *Spaniards*.

The *Spaniards* may also have wrought Mines of Gold and Silver within the Isthmus; but no such possession can support their Complaint: The nearest possession of Mines that they can pretend was in Captain *Diego's* Country, on the Gulf of *Darien*, more than 15 Leagues distant from the Company's Settlement; Neither did the *Spaniard* get these Mines by Conquest, or Purchase, but by a plain stipulate Permission from Captain *Diego*, and his people, which changed not the Property; And upon Breach of Conditions, the *Spaniards* were quickly cast out, so that when the Company came to settle on the Isthmus, it was fully cleared of the *Spaniards* &c all their pretences.

Cartagena, *Portobello* and *Panama*, are adjacent to, and do in a manner environ the Isthmus of *Darien*; But that this Vicinity gives to the *Spaniards* no Claim of Right, is evident from many Instances; *Tangier*, *Cheuta* and *Mamora*, ly in the Bosom of the Empire of *Morocco*, and yet belong to European Princes; The English and French have Neighbouring Settlements upon the River *Gambo* in *Africk*, and all along the Coast of *Africk* the English and other European Princes have their Settlements intermixed and contiguous, where they Trade with all Freedom, without any mutual Impeachment. The English and French have both Plantations upon the Island of *Newfoundland*, and the Dutch in time of Peace settled upon *Long-Island*, and the adjacent Countrey environed on all hands by

by the *English* Plantations, and yet no War ensued, but the *Dutch* continued their possession till the Exchange was made for *Suranam*.

The Spanish Fleets do necessarily pass betwixt the Cape of Florida belonging to the *Spaniards*, and the *Bahama* Islands, yet the *English* possess themselves of the said Islands, and have also several times settled at *Port-Royal* in the bottom of the Bay of *Campiechy* in the Gulf of Mexico, for cutting of Logwood, and have thence removed and settled again at their pleasure. The *French* have also endeavoured to settle in the Bay of *Mexico*, and lately and more closely in the *Samblas* Islands on the Coast of *Darien*; They likewise settled a Colony in *Petitguavis* in *Hispaniola*, and in *Guiana* on the Continent, notwithstanding of the Vicinity of the *Spaniards*. The *Dutch* and *Portuguese* have their Respective Plantations on the Coast of *Brasil*, to which the *Spaniards* pretend Right as well as to the Isthmus of *Darien*, such as the Islands of *Cura-sao*, and *Bowane*, near to *Carthagena* on the East, and *Suranam* and others upon the Continent; and yet never quarrelled. It is granted that the *Spaniards* in their excessive Jealousie, and upon the Pretext that by Treaties, none were to Trade in their Ports or Harbours, such as *Carthagena*, and *Porto-bello* without their Licence, have seized and made prize of the Ships that they have found upon the Coast betwixt the said Places; But first, they did this upon pretext of the said Treaties. Secondly, Injury and Violence make no Right.

And thirdly, it is most certain when the *Spaniards* have been overcome and beat off in such Attempts, and forced to suffer both *Dutch* and *English* to cut Logwood on that *Coast*,

Coast, yet the Spaniards did never complain of any Violation of Right, as knowing perfectly they had none, as may be seen in *Dampier, Water,* and other writers.

The Spaniards at first endeavoured to amuse the World, with the Popes Gift of the West-Indies, and after the King of Spain's becoming King of Portugal, and in the Right of that Crown, claiming the Benefit of the Popes Gift of the East-Indies, he assumed the Magnifick Title of *Indiarum Rex*: Yet he was never able to make good his Right, or exclude others by these empty Names; but in all Competitions the Pretentions of Spain, did either resolve in Occupation of what was void or surrendered, or conquest of what was possess'd by Natives; and that Title was never much regarded, either by Spain, Portugal, or any other Prince Popish or Protestant.

The second Head which may be pleaded for the Spaniard, is, the Treaties that have been betwixt the Crowns of *England* and *Spain*. But 1mo. Granting that the Kingdom of *Scotland* will never disown any Treaty betwixt their King (whom G O D long preserve and prosper) may be concerned, where are these Treaties that exclude either the *Scots* or *English*, from possessing *Darien*? if not inhabited, or where Inhabited, with consent of the Inhabitants? If the Spaniard propone upon these Treaties, they must produce them. 2do. All to be found in the latter Treaties betwixt the said Crowns, such as the Treatie 1667, and the Treatie 1670, which may be understood to be the only Regulating Treaties in this Matter, is that in the former, The King of *Spain* obliges himself not to molest the King of *England*,

or his Subjects in their Plantations in *America*, these particulars enumerated not by way of Exception, but because some of them had been contraverted. And that in the other Treaty 1670. It is agreed in the 7th. Article, That the King of Great Britain, and His Heirs and Successors, shall have, hold, and possess, with full Right of Empire, Property, and Possession, all Lands, Regions, Isles, Colonies, and Lordships, situated in the West-Indies, or any part of *America*, which his said Majesty, or his Subjects, did then hold or possess, So that no controversie on any pretence, was thereafter to be moved on that Subject. And in the eight Article, That the Subjects of the said King should abstain from all Commerce, and Navigation, in the Ports and Places, having Forts, Castles, or Staples for Merchandise, possessed by either of them. To wit, That the Subjects of Great Britain should not Trade, nor Sail to the Ports nor Places, which the King of Spain hath in the West-Indies, nor the Subjects of the King of Spain, Trade nor Sail to the Places, which the King of Great Britain there possesses, without Licence given *hinc inde*, in the Terms therein set down. By which it plainly appears, that all agreed to, was, and is, That the Kings and their Subjects respectively, should forbear Injuries, as likewise to Trade and Navigate without Licence in the Ports, Castles, and Staples, to either of them belonging, which can no ways exclude the King of Great Britain and his Subjects from Trading, or making new Plantations in to such Places in *America*, as either are not inhabited, or where the King of Spain hath no Right. The Spaniard may positively pretend, that the Treaties provided

ed to the King of *England*, and his Subjects of certain particular Places, and generally what they then posseſſ'd in the *West Indies*, may be conſtrued an Exception, and import (as it were) an Acknowledgement, that the rest of the *West Indies* did belong to the Crown of *Spain*. But, 1mo, The Places provided to the King of *England* and his Subjects are only enumerate for the greater Caution and Security, because ſome of them had been taken from the King of *Spain*, and thereupon contraverted. And, 2do, It is evident by the foreſaid eight Articles, the Reserve of Trade is equally and muſtually provided, and reſtricted to the King of *Great Britain* and the King of *Spain*, their reſpective Posſeſſions; ſo that nothing can be elicit from theſe Treaties, to give the King of *Spain* the Right to the whole *West Indies*, excepting the foreſaid places posſeſſed by the King of *England*, nor to ty up the King of *Brittain* and his Subjects, from making new lawful Acquisitions in theſe Parts. *But it is agreed to*, That they ſhould ſecure the one, the other in their reſpective Posſeſſions; And thus theſe Treaties have been alwaſys understood, nor have they hindred the English to enlarge their Posſeſſions in the *West Indies* upon just Occasions, which certainly belongs as much, if not more to the Scots.

2d, MEMORIAL, By the same.

The Company of Scotland Trading to *Africa* and the *Indies*, having by the other Memorial, endeavoured to clear the Justice of their Proceedings, as to their Settling a Plantation in the *Isthmus of Darien* in *America*, do further in Humility Represent,

1^{mo}, That there was never any Enterprize of a more National Concern, than the foreaid Plantation is to the Kingdom of *Scotland*, the Erecting and Establishing of the said Company, was the Unanimous Desire and Satisfaction of the Nation, all Persons almost, and Families of any Consideration, did readily subscribe for, and advance considerable Sums, for carrying on the Designs of the Company, much above what could have been expected. The Success the Company hath had, in overcoming Difficulties, and fixing upon a Place that appears so advantageous to Trade and Commerce, hath likewise raised the Expectation and Desire of its Continuance and Prosperity, to a far higher Degree than ever was known in any Business of this Nature: And, *Lastly*, it is most certain, That nothing could be more Grievous and Afflicting to the whole Nation, without Exception, than that this Undertaking, so far and so happily advanced, should meet with the least Discouragement, especially from such, whose Countenance and Assistance is so earnestly craved.

2^{do}, It appears from the whole Circumstances of this Affair, That the *English* Nation can have no Prejudice, but rather Advantage by the foreaid Undertaking: For, *First*, If it shall be profitable, the Profit evidently redounds to their Fellow Subjects and good Neighbours. *Secondly*, The *English* have free Access, to come in and partake of the Profit, when they please. *Thirdly*, The Product of the Place is probably like to consist neither of Tobacco nor Suggars, the great Commodities of the *English* Plantations, but of such Goods and Commodities, as the *English* do not afford. *Fourthly*, It is true, That by the Act
of

of Parliament, and Patent of the Company, all Ships employed by the Company, are to return to the Kingdom of *Scotland* with their Effects : But it is as true, That the said Act and Patent did bear the Liberty and Priviledge of a Free Port, and Merchant for all Strangers that shall be pleased to Trade with them, who are not under the foresaid Obligation, but may come and go with their Return whether they please, which cannot but be of Advantage to the whole *English* Plantations, as to a Free Course of Trade. *Fiftly*, It is likeways granted, That by the foresaid Act of Parliament, the Ships, Goods and Effects whatsoever belonging to the said Company, are declared free of all Customs and other Duties, for the space of 21 Years, but then four of the said Years are already run, and this small Encouragement was needful to begin so great a Work, whereof probably the Profit can little more than equal the Expenses for all that space ; And besides, the Duties of Tobacco and Sugar, not of the Growth of the said Plantation, are excepted, and not discharged : And also it is evident, That if the Plantation prosper, the foresaid short Discharge of Customs, and other Duties, will be richly compensated by the great Increase of Trade, and consequently of His Majesties Customs, that may for thereafter be thence expected. And, *Sixtly*, The Company and Plantation cannot reasonably threaten any Diminution of His Majesties Customs in *England* ; but on the contrary, this Plantation promising a new Trade, far different from the Trade of all the *English* Plantations, and offering to all, the Liberty of a Free Port, must rather increase the Trade of *England*, both to the King and Subjects Advantage.

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As for the Objection, That the Company, by the Immunity they have from Customs and Duties, may Import, and then as freely Export, and so undersell any other Nation, during that Immunity: Its Answered, That the Company in *England* have almost the same Priviledge, since, if they please to Export after their Return from the Plantations, they are allowed to do it freely with a full Draw-back, excepting only 3 or 4 per Cent.

3tio, It is with Submission Represented, That in all Appearance, if the Company of *Scotland* had not seized the foreaid Post in *Darien*, the *French* had certainly taken it: And now, that it is discovered to be so advantageous for Trade, it is not to be doubted, but that the *French*, who shew such Earnestness to have the *Scots* excluded, will certainly, if any such thing should happen, possess themselves of it, not only to the Hurt of the *English* Plantations, but to the far greater Prejudice, if not the Ruin of the *Spaniards* Interest in the Indies.

And therefore, All things truly and justly considered, it is hoped, that not only the *English* will become more and more favourable to so good a Design, but that even the *Spanish* will the more easily acquiesce to Reason and Justice, that they see a more Powerful Competitor ready to catch hold of an Advantage, that cannot be so safe for them in the Hands of any other Nation, as in the Possession of the foreaid Company.

3d. MEMORIAL, By the same.

The Company of *Scotland* Trading to *Africa* and the *Indies*, being endued with very ample Priviledges, hath settled a Colony at *Dari-*

en,

en, a Countrey very fit and proper for that purpose, not only for the Richness of the Soil and Mines, but likeways by its Situation for Trade.

The Spaniards have the most considerable Interest and Plantations in America, and are not willing, that any other Nation, or People should have share of the Advantages and Benefits they draw from thence, which is not Singular in the present Case, because they have ever withstood all Planters, either upon the Continent, or American Islands, by Acts of Violence and Hostility, as if every Settlement in America were an Encroachment upon the Right of Spain.

There is lately a Memorial offered in behalf of the King of Spain, to one of the Secretaries of State of the Kingdom of England, to the Effect following.

' My Lord Ambassador of Spain finding himself oblig'd, by express Order, to represent to His Majesty of Britain what follows, Prays Mr. Ver-
non to represent to his said Majesty, That the King his Master, being informed from several parts, and last of all, by the Governour of Havana, of the Insult and Attempt of some Scots Ships, equipt with Men and Ammunition necessary, who endeavours to post themselves in the Sovereign Dominions of His Majesty in America, and particularly in the Province of Darien.

' His Majesty received this Information with Dissatisfaction, as a Mark of little Amity, and a Rupture of the Alliance which is betwixt the two Crowns, which His Majesty hath always observed very Religiously, and from which so much Advantage and Profit hath resulted, both to His Majesty and his Subjects, after which good Correspondence, His Majesty did not ex-

spec^t such sudden Attempts & Insults from His
Majestys Subjects, and that in time of Peace,
without any Pretext or Cause, in the most in-
ward part of his Dominions.

All that the King desires, That this be present-
ed to His Majesty of *Brittain*, and that His Ma-
jesty is very sensible of such Hostilities and Un-
just Procedures, against which, His Majesty will
take such Measures as are convenient. *London,*
May 3d. 1699.

THE Charge is great, and if it can be made
appear, that the King of *Spain* is Invaded,
as is pretended, it is but Reason there should be
just Reparation.

It must be acknowledged, That it is a fair
way of dealing, that the *Spanish* Rights and Pre-
tensions are thus asserted by Memorial, and an
Opportunity afforded, and that the whole World
may be satisfied, that His Sacred Majesty, the
King of *Great Brittain*, hath granted no Patent to
His Subjects in *Scotland* disagreeable to Treaties
with *Spain*, and that the *Scots* Company have not
exceeded the Limits of their Patent, to the preju-
dice of *Spain*.

There may be many Reasons offered to satisfy
Spain, and all other Nations of *Europe*, except
the *French*, that if the *Scots* had not settled in that
Isthmus, or if they were now to remove from it,
the same would be possess'd by another People,
more dangerous to the Interest of *Spain*, and in
due time it may be made appear, that the *Scots*
Settlement is for the Honour of the King, & the
Interest of *England*, but the present design is only
to satisfy the World, that the Patent granted by
His Majesty, was agreeable to the Treaty with
Spain

Spain, and that the Scots Company have not exceeded the Terms of their Patent, and that they have Right to what they possess in the Isthmus of Darien, according to the Law of Nations, and that most part of the Nations in Europe have settled Plantations in the American Islands, or Continent, upon no other Foundation than the Scots.

It is the Interest and Policy of all Governments, to improve the Natural Product of a Countrey, and to encourage Forreign Trade.

The Experience of all Nations makes appear, That nothing contributes so effectually to these ends, as Forreign Plantations.

Scotland is amongst the last of the Nations of Europe, in settling Forreign Plantations; tho' there be few that can propose more Advantage that way, because the Nation affords many Subjects of Manufacture, and abounds in Men, which is the greatest Riches, as well as the Strength of a Nation; Yet for want of Forreign Plantations, many have been useless and burdensome to their Native Countrey, and have been constrained to serve Abroad in Forreign Wars, or into Plantations of other Countreys: And it is to be observed, that wherever they have planted, they have increased and multiplied, as particularly in Ireland, but no part of the Benefit does accrue to their Native Countrey.

The Nation has very long desired Forreign Settlements of their own, and did make some Attempts that way, which proved ineffectual for want of due Encouragement, but His Sacred Majesty, as Father of his Countrey, regarding the Welfare of it, did endue the same with suitable Encouragements by the 32d. Act, Par. 1693. and by the 8th. Act, Par. 1695. Yet both these Laws

were granted with a due regard to all former Planters; " And did only allow them to plant Colonies, build Cities, Towns, and Forts in *Asia, Africa, and America*, upon Places not inhabited, or in, or upon any other Place, by Consent of the Natives, or Inhabitants thereof, and not possessed by any European Sovereign, Potentate, Prince or State.

By these Acts of Parliament, and Patent conform, His Majesty did sufficiently provide, that the Possession of no European Prince should be invaded or molested: And if *Spain* be injured, the Company must acknowledge, that the Injury flows from them, by exceeding the Limits of their Patent.

It remains to be cleared in behalf of the Company, that they have strictly observed the Rules prescrib'd by the said Acts and Patent.

The King of *Spain's* Title to *America* by the Pope's Bull, is rejected by the common Consent of all the Princes and States in *Europe*, who could not have settled there without Injury to *Spain*, if the Pope's Bull had been a sufficient Title; and neither *Spain* or *Portugal* hath relied upon that Title, the one having planted in the *East-Indies*, and the other in the *West*, without regard to it: And this Title is sufficiently discussed by *Grotius* in his *Mare Liberum*, Cap. 3. and will never be insisted on any where, and least of all in *Brittain*.

America being inhabited by Natives, before *Spain* or any *European* People settled there, it is most certain, that the Right and Property did originally belong to these Natives, because the Earth was created for, and freely given by the Creator to the Children of Men, and the most Ancient and Uncontraverted Right of Property

of the Earth is by Occupation and Possession, which is an outward Act of the Body *quasi positio pedis*, and not an inward Act of the Mind, which cannot be known to others, beside many Mens wills might concur in wishing and liking the same thing, but their Bodies cannot concur in possessing it, and an outward Act of Possession warns others to abstain.

The Property that originally belonged to the Natives, could only be transferred from them to Spain by Conquest or Consent, and Spain can pretend neither of these Titles to the *Isthmus* where the Scots have settled.

It is alledg'd for Spain, That they do possess the *Isthmus of Darien*, in as far as they are undoubted Masters of the Bay of *Panama*, and the whole Coast of the *Isthmus* upon the South Sea: They have likewise *Cartagena* and *Portobello* on the North Sea, and they are Masters of the whole Countrey betwixt *Cartagena* and *Portobello*, and so must be reckoned Possessors of all, because Possession doth not require the particular Occupation of every part of a Countrey, but Occupation of one part is a sufficient Act to demonstrate the Will and Intention to posses the whole Pertinents: And the Spaniards having posses'd these two Extremes, the middle Space belongs to them, especially seing they have also settled in other Places betwixt these two, as their Conveniency did require; tho' they did afterwards quite these Possessions, as particularly they once possessed *Nombre de Dios*, and did also plant within the River *Darien*, and tho' they did quite these Possessions, they did not relinquish or repudiate their Right, but being better informed, they choosed more convenient seats, but still reckoned themselves Proprietors of

the whole *Isthmus*, and divided the same in several Jurisdictions. And the Natives upon that *Isthmus* were a mean inconsiderable People not to be regarded, who could not be thought to retain any Right or Property in Opposition to the Power of *Spain*.

They further add, That *Spain* hath been considered as undoubted Proprietors of the Bay of *Mexico*, and of that *Isthmus*, by other Nations in Christendom, and most particularly by the *English*, as is well known, and will clearly appear in two remarkable Instances.

Several *English* Merchants having advanc'd their Stock, for settling a Plantation at *Port-Royal* in the Bottom of the Bay of *Campecbay*, for cutting of Logwood, they desired the Countenance and Protection of the Government, for carrying on this profitable Trade: The Case was consider'd by the Council of *England*, and it was not found just, to allow the Protection of the Government, but were only left in a Permissive State, to manage their Trade upon their Peril.

The Second Case, which comes closer to the present Question, was a Proposal by certain *English* Undertakers to settle in *Darien*, as the *Scots* have done, which being brought to the Council of Trade of *England*, and by them laid before the Lords Justices in His Majesties Absence, and transmitted to the King himself; Upon a full Consideration of the Case, that Project was thought to be an Encroachment upon *Spain*, and let fall.

The King himself, and Council of *England*, being satisfied of the Right of *Spain*, in these particular Cases of *English* Undertakers, the same Judgment ought to follow, in relation to the *Scots* Company.

To all that is alledged, it's shortly and clearly Answered, That Spain hath neither Right by Treaties nor Possession to the Countrey now posses'd by the Scots: And, 1st. Tho' it be acknowledg'd, that the Spaniards have more Strength, and larger Possessions on the South, than upon the North Sea, yet no Possession there can be extended to the North-side of the *Isthmus*, being posses'd by a People Independent, who never received the Spaniards, or became Subject to them; The Spaniards indeed have made great Settlements upon the South Sea, and in so far as they have posses'd, have restricted the Natives to narrower Bounds; but the Indians still continuing to possess what remains, Possession on the Coast, or the Mouths of Rivers on the South Sea, can never be extended to the North Coast: And the Spaniard can condescend upon no Ground in Law or Reason for such an Extension, nor can they make appear, that what the Scots posses is Part and Pertinent of their Plantation, especially considering that the *Isthmus of Darien* is naturally divided by a Ridge of high Hills running from East to West.

Neither doth the possession of *Carthagena* and *Porto-bello*, give Right to the intervening Countrey, which is above 80 Leagues or 240 English Miles, and these particular Forts, as well as the whole Spanish Plantations on the South Sea, being fixt without consent of the Natives, who continue their Possession in the intervening Countrey, without any Subjection to, or acknowledgment of the Spaniard: It lyes upon the Spaniards to condescend by what Rule the Limits of these Possessions can be so far extended.

As to what is alledged, That the Spaniards have other Plantations nearer to the Scots Settlement

ment from which they removed, but still retain Possession and Jurisdiction.

It is Answered, Admitting the matter of Fact as alledged, it comes to nothing ; For still it is to be remembred, That the Spaniard will not pretend to have planted with the consent of the Natives : Nor, that the *Darien Indians* have ever acknowledg'd Subjection ; but they planted by Force and Violence : And therefore, whatever Forts they made in the *Isthmus of Darien*, the moment that these Plantations were left, the Right and Possession of the Natiyes did return.

It is freely acknowledged, That Possession lawfully obtain'd by an outward Act of the Body, is retain'd by Acts of the Mind, if no other possess ; but when Possession is taken by way of Fact, and not actually detained, the Right and Possession returns to the lawful Proprietor.

2. This alledged Possession of *Nombre de Dios*, and in the *River of Darien*, is only pretended to have been at their first Settlement in *America*, before they possess'd *Carthagena* and *Porto-bello*.

3. None of these pretended Settlements are within 20 Leagues of the Scots Colony ; And tho Spain had yet Plantations there, the Limits could as little be extended to 20 Leagues beyond the actual Possession as to a Thousand : Neither can the Spaniards prove any Act of Jurisdiction over the *Darien Indians*, whatever Title they may think fit to give to Governors or Vice-Roy's in *America*, the Scots do neither know, nor are oblig'd to notice the same : If Titles were enough, the King of Spain assumes a Glorious Title of *Indiarum Rex*, but he has no more Jurisdiction over the *Darien Indians*, than in the Plantations of any other European Prince.

As to what is alledg'd upon the Opinions given by the King and Council of England, in relation to His Majesty's English Subjects projecting Settlements in America, The Circumstances of the Projects, and the Motives of any Resolution taken in them, are wholly unknown to the Scots, and nothing can be founded on such Matters of Fact, unless the whole Circumstances were Authentically instructed or acknowledg'd, but whatever was thought proper in these Cases, nothing can be inferred from thence to determine this.

A Project is to be regulated either by Law or by Convenience; And it's very ordinary and suitable, That his Majesty and the Government may discourage the Project of an Undertaking, if not Convenient, tho' lawful : But when a Project is Undertaken, Carried on, and a Settlement made in pursuance of express Acts of Parliament, and conform to a Patent, there's no more place to Deliberate what is fit, but what is Lawful.

If the whole Circumstances were known, many Disparities might also appear, and from the bare relation of the Case of the intended Settlement in the Bay of Campechay a manifest Disparity is evident.

The Bay of Campechay is in the Province of Nicaragua, in the Diocese of Chiapo, which Province and Bishoprick, are part of the Ancient Empire of Mexico, which was conquered by Spain.

By the Conquest of Mexico, the King of Spain as Conquerour, had Right of Sovereignty as far as the Dominions of Mexico did extend, and the Right and Possession of the Conquered People may reasonably be reckoned to become the Possession of the Conquerour; And therefore a Settlement in Nicaragua or Bay of Campechay might be reckon-

reckoned a down Right Encroachment upon Spain, which cannot be drawn in Consequence to a Settlement upon Darien, because the Spaniards can condescend upon no Title or Right beyond their actual Possession ; for the Dariens were never subdued, nor did they ever depend upon Mexico or Peru, or any Prince or People subdued by the Spaniards.

And further, whatever be urged from these Cases, yet it can be made appear, That the Undertaking to settle in Campechay was effectual, and the Cart is marked Port-Royal English-Colony ; and 'tis known that the English cutt Logwood at Cape-Catacb in Yucatan till the Charge of Carriage render'd it unprofitable, and thereafter Settled at Port-Royal for the same Effect, where there is plenty of Logwood appropriated to the English.

It is also acknowledg'd, That the Darien-Indians are no powerful People, or able by themselves to resist the Impressions of Spain, but the point of Right and Property is the same in Rich and Poor, Strong and Weak, and they might lawfully transfer their Right, and assume the Scots or any other Nation to support or maintain the Right and Possession of that Isthmus, in as far as it was free from the Spanish Dominions.

Yet the Dariens were not wholly neglected by the Spaniards as inconsiderable, for there have been frequent and almost constant Wars between them and Spain, in which the several Captains and Carriques have joy ned together, and there is a famous Case of Barth: Sharp, who being accused in England as guilty of Piracy and Robbery committed upon the Indians, he defended himself as acting by Commission from Independent Native Indians then at War with Spain, and was acquitted.

The

The Right of the Scots Colony, as flowing from the Native Indians, is already sufficiently cleared, according to the most Ancient and Authentick Laws of Property, acknowledg'd by all Nations : And for a further Evidence and Demonstration of what has been asserted, and alreadly sufficient-proven the Settlement of the English, French, Danes, Portugueses, and Dutch, will all be found to be Bottomed on the same Ground.

The Spanish are the most Ancient Planters, and if Spain pretend to any Universal Title, either by Occupation of a part, or by the Popes Gift, or any other Right, he thereby excludes the Claim of all Posterior Planters, either in the Continent, or American Islands, which could not be thought to be separate and indifferent Dominions : And if Spain recede from any Universal Title to the whole, it will not be possible to extend his Claim beyond his proper Possession, or the Possessions of these that are Subduced and Conquered by Spain : And if this be called in Question, it is expected, That some other Title will be condescended upon, that may clear the Limits and Extent of the Spanish Colonies, so as to make a Difference betwixt the Scots Settlement in Darien, and the Settlement of other Princes in the American Islands or Continent.

The Empires of Mexico and Peru are known; and may be yielded to Spain, but the remainder of that vast Countrey was anciently possess'd by little Princes, or rather Captains or Heads of Families or Cariques, who have no Dependance upon each other, nor upon any Prince or Potentate, but by Leagues and Agreement for mutual Defence. Thus it is known, That the Land of the Amazons was possess'd by the Natives ; And it is

remarkable, That upon the Banks of *Amazon*, there are Fifty different Nations: So it is in *Braſil*, in *Chili*, *Paragua*, *Florida*, *Carolina*, *Virginia*, and generally over all the Continent, as well as in the Islands of *America*, and likewise in *Asia* and *Africa*: And therefore, European Princes have planted promiscuously, as they found Conveniency, without Injury or Encroachment upon former Planters.

The English possess the Continent from *New-England* to *Carolina*, without the Interposition of Colonies belonging to any European Prince, yet the Dutch, in time of Peace, ſet down upon *Long-Island*, and the Country now called *New-York*, betwixt *New-England* and *Penſylvania*, and continued to possess till the end of the War 1667: At which time, *New-York* was exchanged for *Suranam*.

The Spanish Plate-Fleet do necessarily paſs be-
twixt *Cape-Florida* and the *Bahaman-Islands*, yet the
English possess these Islands, which the Spaniards
did mightily reſent, and used the English very bar-
barously upon it, yet Spain not being able to juſti-
fy any unlawfuſ Title, the English did maintain
their Possession.

Whatever be alledg'd, That the Government
did not interpoſe for establishing a Logwood-
Trade, yet it's certain, that the English did ap-
propriate the Logwood at *Cape-Catch* in *Jucatan*,
till it was exhausted, and they afterwards ſettled
at *Port-Royal* in the Bay of *Campechay*, for carrying
on the ſame Trade, which was never queſtion'd
by the Spaniards.

The French have ſeveral times endeavoured to
ſettle in the River de *Spiritu Sancto* in the Bay of
Mexico, and alſo the *Samballo-Islands* upon the Coast
of *Darien*, and have actually ſettled a Colony in

Petit-

Petit-Guavis in *Hispaniola*, the rest of that Island being possest by the Spaniards: The French have also a Settlement in *Guiana* in the *Terra-Firma*, and several Forts upon the Coast of *Caribana*, and above twelve or thirteen *American Islands*.

The Dutch have also the City of *Coro* in the North of *Terre-Firma*, and *Suranam*, and certain Forts upon the Coast of *Guiana* and *Curasao*, and several *American Islands*.

The Portuguese have the Coast of *Braſil* divided into many Captainships. The Interest of *Spain* was ever opposit to all these Settlements in *America*, and wherever they were strong enough, they attempted to expel the Planters, without regard to Peace or War, whereof the Scots did formerly feel the Effects, in their Plantation at *Carolina* holden of the Crown of *England*, from whence they were expelled: These things were done by way of Fact, but it is the first time that ever *Spain* did openly pretend a Right beyond actual Possession, which was never sustained by any *European Prince*. And it is desired and expected, that there may be a further Condescendance of the Right and Title of *Spain*, to exclude other Planters by the Consent of the Natives, where *Spain* hath no actual Possession, or Exercise of any Jurisdiction.

It is further alledged for *Spain*, That all the Business in *America* was settled by the Pacification 1670, betwixt the Kings of *Brittain* and *Spain*, which did confirm all the Plantations posses'd by *English Colonies*, and left the Remainder of *America* to *Spain*, and whatever happened before that General Treaty, could be no Rule thereafter, because there was almost perpetual War with *Spain* in *America*, which were never settled or composed till the Treaty 1670, which did presuppose and establish

blish the Right of Spain to all that was not possessed by the King of Britain's Subjects.

As to the Instance of Sharp, it is not denied that he was acquitted, and amongst others did propone that Defence, That he Acted by Commission from an Indian Prince; but that Defence was look'd upon as a Jest, and it was not for that Reason that he was acquitted.

It is Answered, There was indeed a Treaty in the Year 1670, concerning America in particular, whereby it was provided, "That the King of Britain should have, hold and enjoy for ever, with full Right of Sovereignty, Dominion and Property, all those Lands, Regions, Islands, Colonies, and Places whatsoever situated in the West-Indies, or any part of America, which the said King and his Subjects did then hold and possess; From which Article the Spaniards would infer, that all the rest of America was lost by the King of Britain, as a Right and Dominion of Spain, because that Spain ratifies the Possession obtained by the King of Britain, and there is not a mutual Ratification of the Possession of the King of Spain.

This Article can bear no such Inference, for,

1. The King of Britain and his Subjects did not then, nor do they now in the least question the Possessions of the King of Spain and his Subjects, but the King of Spain did very much question the Right of the King of Britain to several of his American Plantations, not only upon the general Ground of an Universal Title to all the West-Indies, which no European Prince will bear, but likewise upon particular Claims, that the English had beat out the Spaniards, and enjoyed what had been once possess'd by them in several places; And the former

former Treaties with *Spain* especially that in the Year 1667, were only general, establishing a perpetual Peace betwixt the Dominions and Territories of *Brittaine* and these of *Spain*: But the Question remaining anent the Right and Dominion of these *American* Settlements to which the King of *Spain* did lay still a Claim, The Treaty 1670, did renounce his Claim to the Colonies in the *English* Possession, but did determine nothing as to those parts of *America*, which were never Possess'd by the *Spaniard* or *Brittish*, and if it had been intended, that the Right of *Spain* to all *America* that was not possess'd by some other *European* Prince should be asserted, and declared the same would not have been left to such remote conjectures, but would have been specially express'd.

2. The whole Tenor of that Treaty does sufficiently clear, that no such thing was intended as to presuppose, much less to assert the Right of *Spain* beyond actual possession. For by the Second Article of the Treaty, it is provided, " That there be an Universal Peace in *America*, as in other parts of the World between the Kings of Great *Brittaine* and *Spain*, and between the Kingdoms, States, Plantations, Colonies, Forts, Cities, Islands and Dominions belonging to either of them; and between the People and Inhabitants under their respective Obedience.

This Article in the Treaty relating to *America*, only doth clearly demonstrate, that both Kings were set upon an equal foot, and did Treat for themselves and the People and Inhabitants under their respective Obedience, and no further; so that all matters were left untouched that did concern parts not Inhabited or possess'd by Natives, who were never under obedience to either Prince,

nor

nor would the Treaty have been for Plantations, Colonies, Forts, &c. equally and mutually, if either King had pretended an universal Title or Right beyond Possession.

3. The Eighth Article doth yet further clear, that the King of *Spain* had no Universal Claim, but according to his Possession, which Article provides, that the Subjects, Inhabitants and Mariners of the Dominions of each Confederate, shall forbear to Sail to, or Trade in the Ports and Havens which are fortified with Castles, Magazines or Ware-Houses, and in all other Places whatsoever, possess'd by the other Party in the West Indies. To wit, the Subjects of *Brittain* shall not Sail into, and Trade in the Havens and Places, which the Catholick King holds in the Indies, nor in like manner shall the Subjects of the King of *Spain* Sail into, &c.

This Clause is plainly restrictive upon the King of *Spain*, That the Subjects of the King of *Brittain* shall not Trade into these places of the Indies which belong to *Spain*; for thereby it presupposes that *Spain* has no Universal Title, and its left free to the King of *Brittains* Subjects to Sail into, and Trade in all Ports and Havens which have no Fortifications, Castles, Magazines, or Ware-Houses Possess'd by the King of *Spain*, and consequently it was lawful to have sailed to, and Traded with the *Darien Indians*, where the King of *Spain* had no Fortifications, Castles, Magazines or Ware-Houses, nor can clear any manner of Possession, and if they might Trade with the *Indians* it must be acknowledg'd they might Settle among them.

" It's also provided by the Tenth Article, " that in case the Ships of either Party be forced by

" by streſs of Weather, or otheriſe into the Rivers, Creeks, Bays or Ports belonging to the other in *America*, they ſhall be treated there with all Humanity and Kindneſs; Which Article ſtates both Kings again upon an equal foot, and mentions the Right of both as reſtrictive to particular Rivers, Creeks, Bays, &c. in *America* as if neither Party claimed Universal Title over all.

" The 15th. Article of the ſaid Treaty provides, that the ſame ſhall in nothing derogate from any preheminity, Right or Dominion of any Confederate in the *American Seas*, Channels or Waters, but that they have and retain the ſame in as full and ample manner as may of right belong unto them, providing al-ways that the Liberty of Navigation ought in no manner to be disturbed.

This Article relates to certain Preheminencies and Priviledges claim'd by Spain in the *American Sea*, which by the Treaty was not yeilded, but left in the ſame ſtate as formerly; and if the King of Spain had pretended to an Universal Right over all *America*, in fo far as is not poſſeſ'd by other European Princes, why was he more carefull to preserve his Claim of Sovereignty in the Seas, and forgot his Dominion upon the main Land? There can be no other reaſon for it, but because there was no ſuch thing in proſpect, as appears by the whole Tenor of the Treaty.

Nothing hath been alledged in behalf of Spain to make any disparity betwixt all the Settlements that have been made in *America* by the Subjects of the King of *Brittain* or other Princes, except the Treaty 1670: Which when duly conſidered, makes no disparity at all. - For albeit the Poſ-

Possession of the King of Brittain's Subjects be thereby confirmed; yet it will not be acknowledg'd by the King of Great Brittain, or any other Prince that the Settlements made by their Subjects were illegal or violent, untill confirmed by the King of Spain, and all Nations who have Planted there must sustain and justify the Scots Settlement, or acknowledge that the Settlement of their own Subjects were injurious to the Right of Spain.

It is not, nor can be denied, that the *Dariens* have been at frequent War with *Spain*, altho' they pretend, that the *Dariens* were rather Rebels than Enemies. That is only for to beg the Question, for the Natives having the Ancient undoubted Right, it must be instructed, that they became Subjects before they could be Rebels.

And tho' it be alledged, that what was done in *Sharp's* Case was reckoned a Jest, and that he was not acquitted upon that ground, as acting by Commission from the *Dariens*; yet the matter of Fact is certain and known, and was indeed remarked by all *England*, that *Sharp* join'd with the *Dariens*, did commit acts of Hostility and carried away great booty from the *Spaniards*, and was pursued for Restitution in *England*, and did propose a Defence. That he acted by Commission from an Independent People, and was acquitted by a competent Judicature in *England*.

These matters of Fact being all acknowledged, it must be thought that a Decision in the way of Justice was no Jest, but according to the Law of the Nation.

To Conclude and Sum up the whole Matter, The Scots did not move one foot, untill they obtain'd two Acts of Parliament, and a Patent in their favours. These Acts (tho' very ample) were

were framed with a just regard to former Planters, who by the express Tenor of the said Laws were not to be invaded or molested in their Possession; even the just Right and Property of the Infidel Natives was considered, and the Undertakers not allowed to dispossess them by Force and Violence, but to Plant with their consent: Upon the faith of these Laws, a greater Stock was advanced in *Scotland* than ever was raised by any other Nation, upon the first project of a Foreign Plantation; the Directors of the Company did very narrowly and exactly consider all the Treaties with *Spain*, and pitched upon a place, that the whole World considers to be of a great value for founding and raising a profitable Trade to the Honour of the King who (as the Father of the Country) did endue them with ample and just Priviledges, to the encrease of the Strength and Riches of the Isle of *Brittain*; which is all under the Government of one Monarch, of one Religion and Interest, and can have no different Friends or Enemies without endangering the whole. In one word, The *Scots* Company have acted deliberatly, for advantag to themselves, the Nation, and the Isle of *Brittain*; they have only used their own Right and have wronged no Nation or People, nor exceeded the Limits of their Patent in any circumstance. And if any will stand up for the Interest of *Spain*, and call in question the matters of Fact and principles of Law above asserted, which are generally known and need not to be confirmed by particular Citations, they may assuredly expect that what has been affirmed shall be made further clear and evident beyond contradiction, and whatever Obstacles

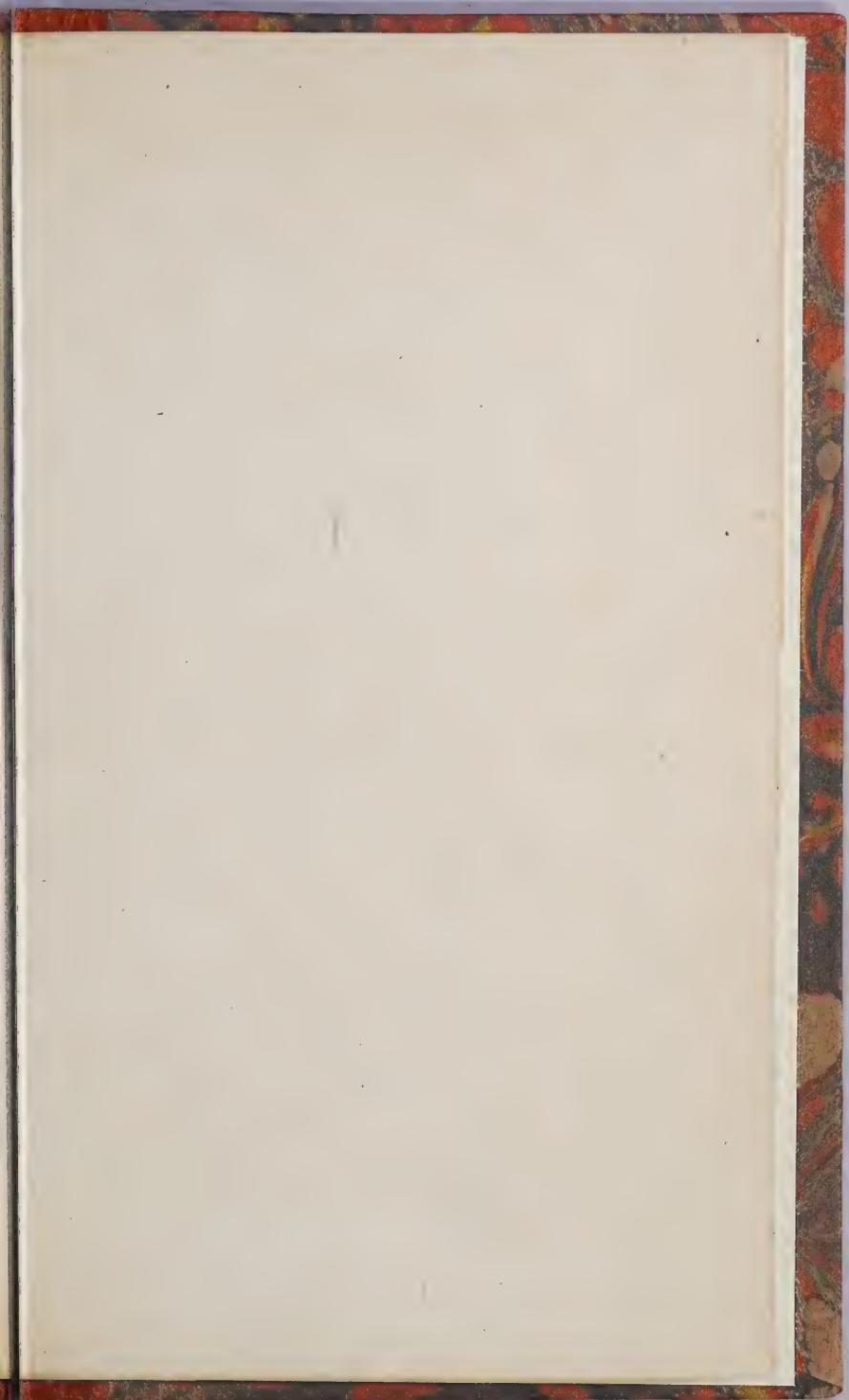
or Difficulties have, or may fall in, *Ardua que Pulchra*, the undertaking was deliberate, just for the interest of the Nation, and with more regard to the Right of former Planters and Natives than any former Project of that Nature.

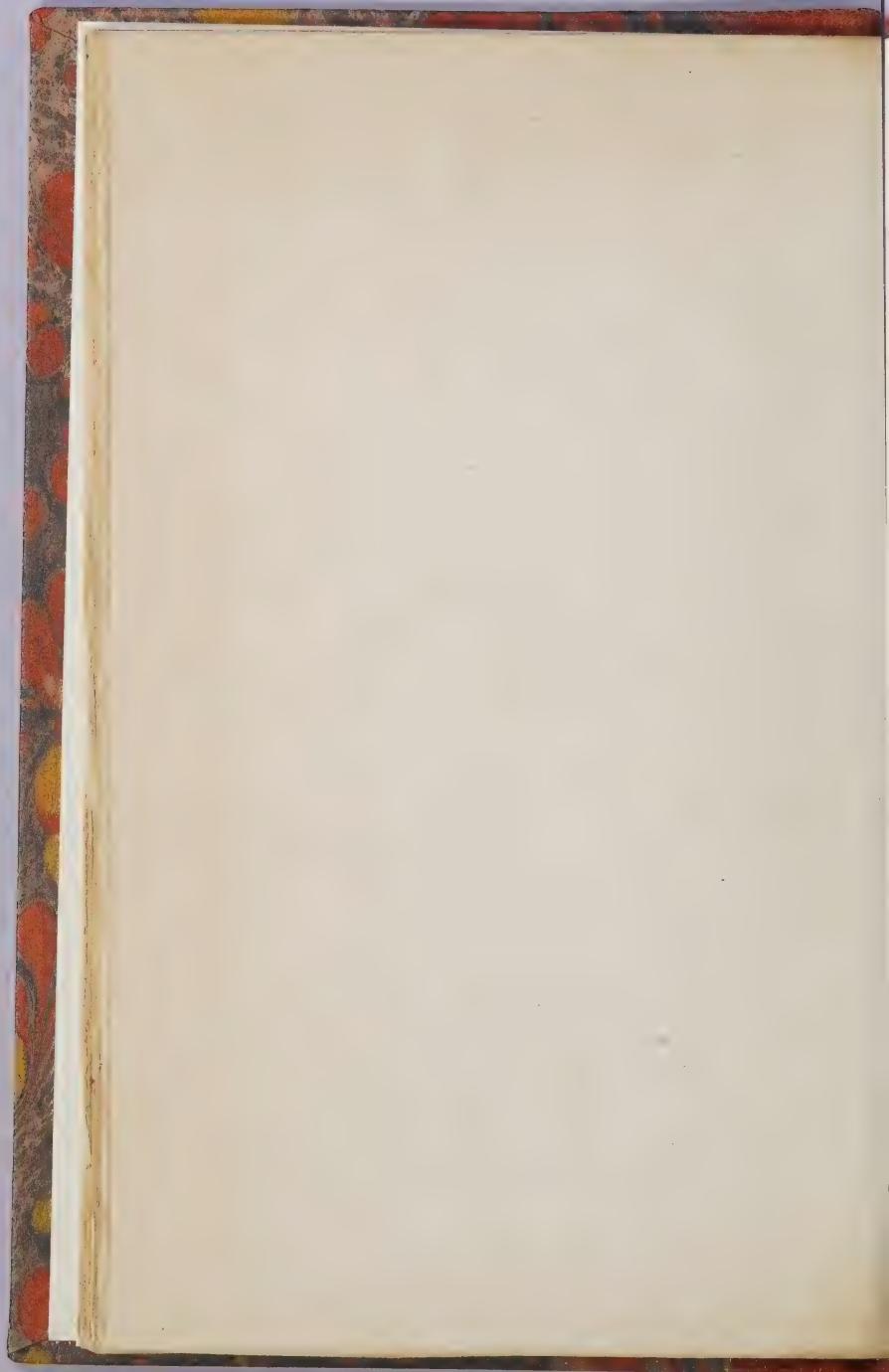
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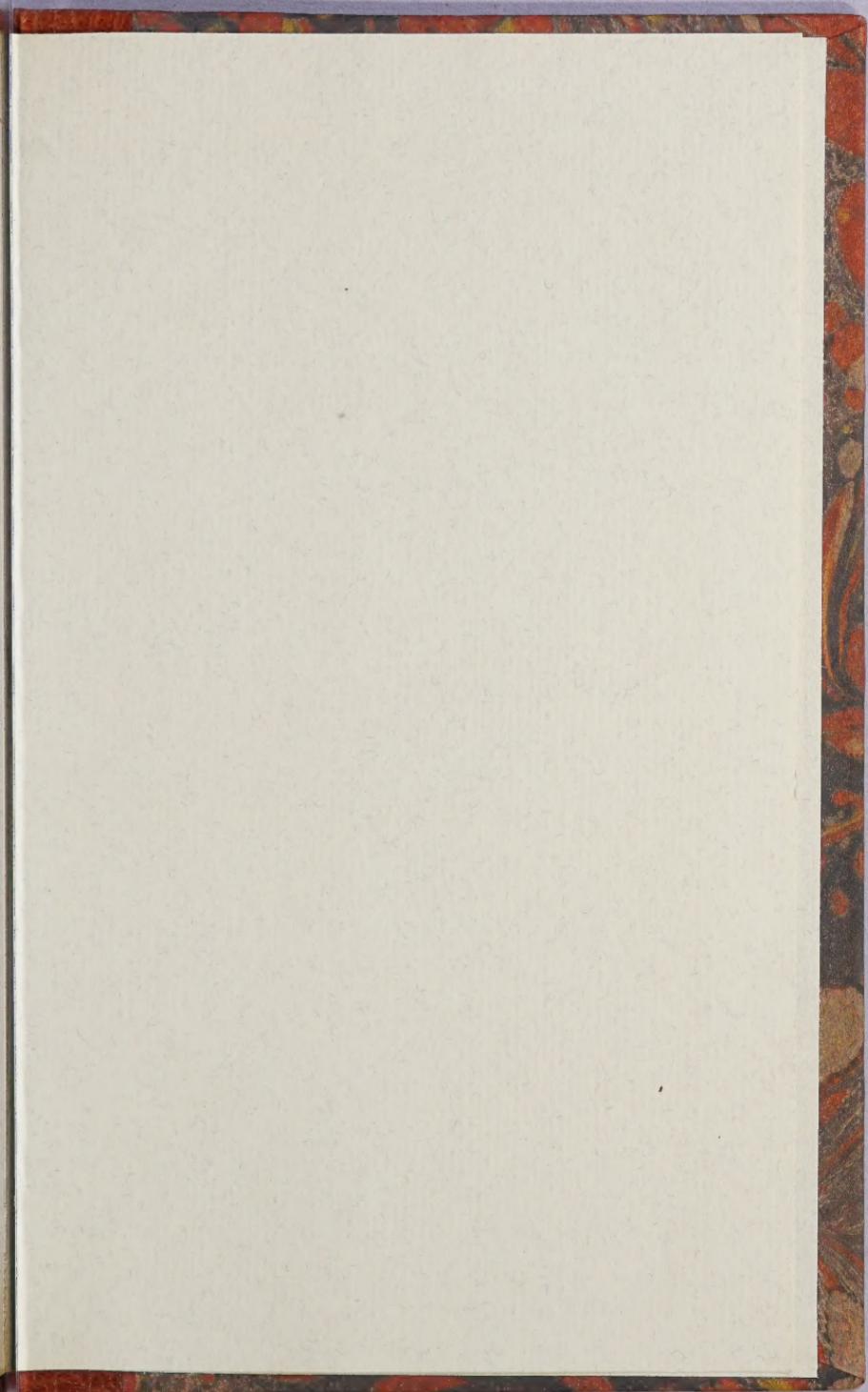
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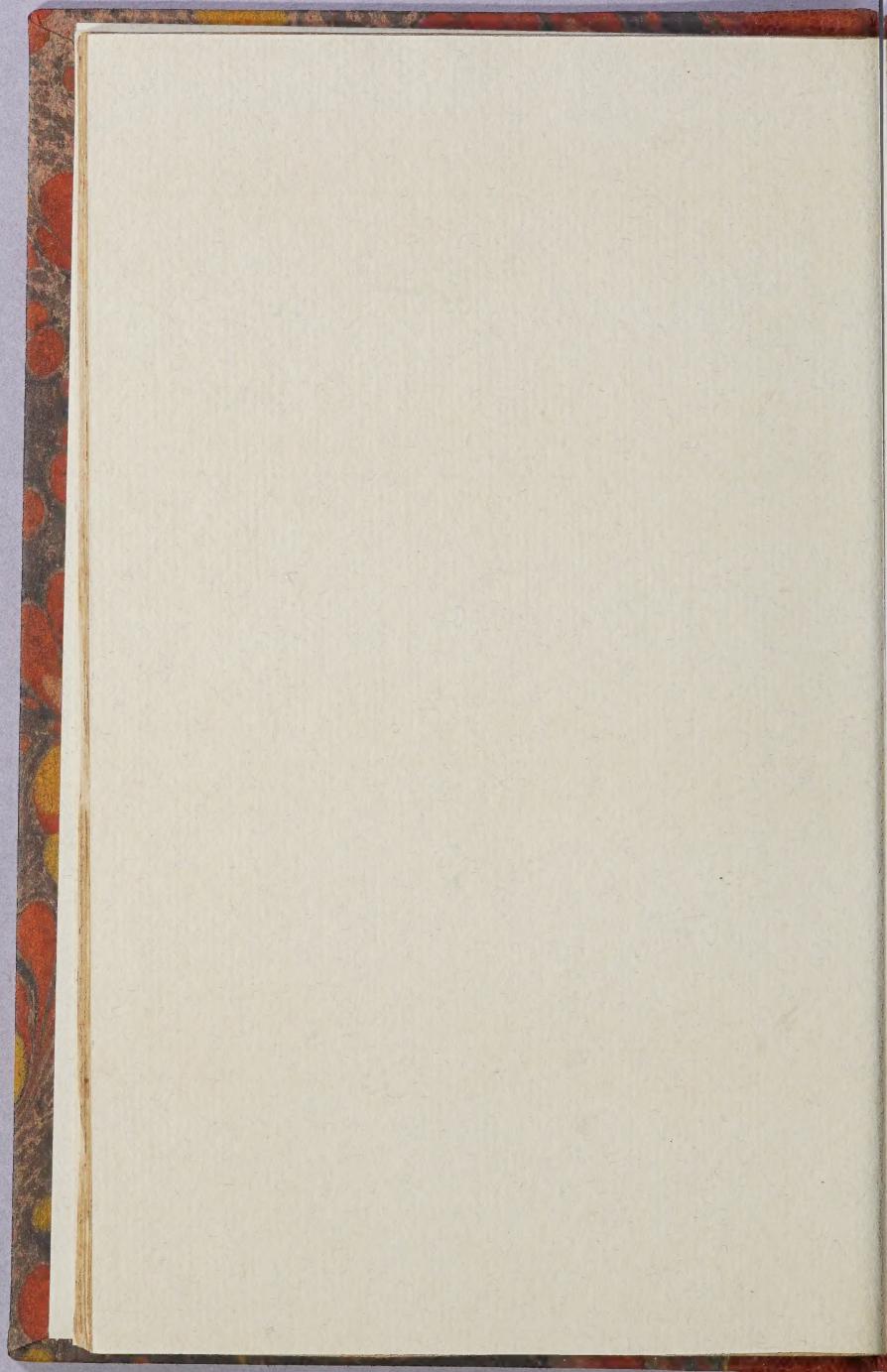
WHoever would be furnished with any more Arguments for proving the legality of the Settlement of Caledonia, and with a full account of all the considerable occurrences relating thereto may have his judgment sufficiently inform'd, and his Curiosity abundantly gratified by reading the following Books.

1. *A Defence of the Scots Settlement at Darien.*
2. *A short and impartial view of the manner and occasion of the Scots Colony's coming away from Darien.*
3. *An Enquiry into the Reasons of the Miscarriages of the Scots Colony at Darien, &c.*
4. *A just and modest Vindication of the Scots Design for the having established a Colony at Darien.*
5. *A full and exact Collection of all the considerable Addresses, Memorials, Petitions, Answers, Proclamations, Declarations, Letters and other Publick Papers relating to the Company of Scotland Trading to Africa and the Indies, since the passing of the Act of Parliament, by which the said Company is established, together with the Act it self;*









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